Teo Kim Huatt v AETNA Universal Insurance Bhd (No 1)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-22-384 OF 2001
ABDUL MALIK ISHAK J
28 FEBRUARY 2002

Civil Procedure *— Injunction — Ex parte injunction — Holding over — Whether order for holding over could be varied or discharged — Extension of ex parte injunction beyond 21 days from date it was granted — Whether ex parte injunction automatically lapsed at end of 21 days*

On 21 May 2001, the court granted an ex parte interim injunction against the defendant on the application of the plaintiff. The inter partes hearing was fixed on 8 June 2001 but the hearing was not proceeded with as the defendant requested for additional time to file an affidavit on reply. The parties agreed to postpone the inter partes hearing to 18 June 2001 and they both agreed to a holding over of the ex parte injunction until then and the court made a ruling to that effect. However, the inter partes hearing did not proceed on the stipulated hearing date. Again, the parties agreed to a holding over of the ex parte injunction. The inter parte hearing was postponed for a few more times and on each occasion, the judge ruled that the holding over of the ex parte injunction be accordingly extended. The defendant's counsel did not object to the holding over of the ex parte injunction, except on two occasions, one on 3 July 2001 and the other was on 13 December 2001. The defendant had filed an appeal against the judge's ruling made on 13 December 2001 to extend the ex parte injunction.

Held:

(1) The holding over of the ex parte injunction was made in the presence and with the consent of the parties. Prima facie, once an order was made in the presence of the parties, they were bound by it and the order could not be varied or discharged unless it was obtained by fraud, collusion or by an agreement contrary to the policy of the court. In the instant case, when the parties agreed by consent to the holding over of the ex parte injunction on every occasion, there was no fraud or collusion and the parties were not acting contrary to the policy of the court (see pp 340I–341B).

(2) The defendant, through its counsel, had agreed to the extension of the ex parte injunction. Once a representation had been made and acted upon, the court would be reluctant to permit the person making the representation from going back on his word. Here, the court had acted on the representation by defendant's counsel when the ex parte injunction was extended (see p 340C–H).

(3) In respect of the defendant's appeal against the judge's ruling made on 13 December 2001, a ruling could never be equated to a judgment, sentence or order. The ruling of 13 December 2001

was not caught by the definition of the word 'decision' as set out in s 3 of the Courts of Judicature Act 1964 and as such, the defendant could not appeal against the ruling made on 13 December 2001 (see p 341E–G).

(4) In the final analysis however, the decision in *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433 posed a barrier to the plaintiff as there was no choice but to dissolve the ex parte injunction granted on 21 May 2001. In reality, the life span of the ex parte injunction that was granted on 21 May 2001 had automatically lapsed at the end of 21 days from the date on which it was granted, that is, 10 June 2001 (see pp 340A, 342D–E).

[Bahasa Malaysia summary

Pada 21 Mei 2001, mahkamah membenarkan satu injunksi interim ex parte terhadap defendan atas permohonan plaintif. Perbicaraan inter partes telah ditetapkan pada 8 Jun 2001 tetapi perbicaraan tersebut tidak diteruskan kerana defendan telah memohon lanjutan masa untuk memfailkan satu afidavit jawapan. Pihak-pihak tersebut telah bersetuju untuk menangguhkan perbicaraan inter partes tersebut kepada 18 Jun 2001 dan kedua-duanya bersetuju untuk satu 'holding over' injunksi ex parte tersebut sehingga itu dan mahkamah telah membuat satu arahan berhubung perkara tersebut. Namun begitu, perbicaraan inter partes tidak diteruskan pada tarikh perbicaraan yang ditetapkan. Sekali lagi, pihak-pihak telah bersetuju untuk satu 'holding over' injunksi ex parte tersebut. Perbicaraan inter partes tersebut telah ditangguhkan beberapa kali dan setiap kali, mahkamah memutuskan agar 'holding over' injunksi ex parte tersebut dilanjutkan sewajarnya. Peguam bagi pihak defendan tidak membantah terhadap 'holding over' injunksi ex parte tersebut, kecuali untuk dua kali, satu pada 3 Julai 2001 dan satu lagi pada 13 Disember 2001. Defendan telah memfailkan satu rayuan terhadap arahan hakim yang dibuat pada 13 Disember 2001 untuk melanjutkan injunksi ex parte tersebut.

Diputuskan:

(1) 'Holding over' injunksi ex parte tersebut telah dibuat dalam kehadiran dan dengan persetujuan pihak-pihak. Prima facie, setelah satu perintah dibuat dalam kehadiran pihak-pihak tersebut, mereka terikat dengannya dan perintah tersebut tidak boleh diubah atau dilepaskan kecuali jika ia diperolehi secara fraud, pakat sulit atau melalui satu perjanjian yang bertentangan dengan polisi mahkamah. Dalam kes ini, apabila pihak-pihak tersebut bersetuju dengan kebenaran untuk 'holding over' injunksi ex parte setiap kali, tiada fraud atau pakat sulit berlaku dan pihak-pihak tersebut tidak bertindak bertentangan dengan polisi mahkamah (lihat ms 340I–341B).

(2) Defendan, melalui peguamnya, telah bersetuju dengan lanjutan injunksi ex parte tersebut. Setelah satu representasi dibuat dan dilaksanakan, mahkamah akan keberatan untuk membenarkan sesiapa yang membuat representasi tersebut untuk melanggar janji beliau. Di sini, mahkamah telah bertindak atas representasi peguam defendan semasa injunksi ex parte tersebut dilanjutkan (lihat ms 340C–H).

(3) Berhubung rayuan defendan terhadap arahan hakim yang dibuat pada 13 Disember 2001, satu arahan tidak boleh disamakan dengan satu penghakiman, hukuman atau perintah. Arahan 13 Disember 2001 tidak terikat oleh tafsiran perkataan 'keputusan' sebagaimana yang dinyatakan dalam s 3 Akta Kehakiman Mahkamah 1964 dan oleh demikian, defendan tidak boleh membuat rayuan terhadap arahan yang dibuat pada 13 Disember 2001 (lihat ms 341E–G).

(4) Namun begitu dalam analisa akhir, keputusan dalam *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433 menimbulkan satu halangan kepada plaintif kerana tidak terdapat pilihan tetapi untuk membubarkan injunksi ex parte yang telah dibenarkan pada 21 Mei 2001. Pada hakikatnya, jangka hayat injunksi ex parte yang telah dibenarkan pada 21 Mei 2001 secara serta-merta luput setelah tamat 21 hari daripada tarikh ia telah dibenarkan, iaitu 10 Jun 2001 (lihat ms 340A, 342D–E).]

Notes

For cases on ex parte injunction, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2507–2543.

Cases referred to

Attorney General v Albany Hotel Co (1896) 2 Ch D 696 (refd)
Attorney General v Tomline (1877–78) 7 Ch D 388 (refd)
Banner, Ex p; Re Blythe (1881) 17 Ch D 480 (refd)
Banque Des Marchands De Moscou (Koupetschesky) (In liquidation) v Kindersley & Anor [1951] 1 Ch 112 (refd)
Bowker v Hunter (1783) 2 Dickens 605 (refd)
Buck v Fawcett (1733) 3 PWMS 242 (refd)
Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd [1947] AC 46 (refd)
Carew v Cooper (1863–64) 12 WR 767 (refd)
Cheah Cheng Lan v Heng Yea Lee [2001] 1 MLJ 433 (folld)
Cole v Langford (1898) 2 QB 36 (refd)
Combe v Combe [1951] 2 KB 215; [1951] 1 All ER 767 (refd)
Davenport v Stafford (1845) 8 Beav 503 (refd)
Evans v Bartlam [1937] AC 473; [1937] 2 All ER 646 (refd)
Freeman & Anor, Assignees of William Broadbent v Cooke (1848) 2 Ex 654 (refd)

Furnival v Bogle & Ors (1827) 4 Russ 141 (refd)
Harriman v Harriman (1909–10) P 123 (refd)
Harrison v Rumsey (1752) 2 Ves Sin 488 (refd)
Holt v Jesse (1876) 3 Ch D 177 (refd)
Huddersfield Banking Co Ltd v Henry Lister & Son Ltd (1895) 2 Ch D 273 (refd)
Jocelyn Brandon v Dowager Baroness Michelham (1918–19) 35 TLR 617 (refd)
Lissenden v CAV Bosch Ltd [1940] AC 412 (refd)
Low v Bouverie (1891) 3 Ch D 82 (refd)
Lyle-Meller v A Lewis & Co (Westminster), Ltd [1956] 1 All ER 247; [1956] 1 WLR 29 (refd)
Moorgate Mercantile Co Ltd v Twitchings [1975] 3 All ER 314; [1975] 3 WLR 286 (refd)
Moss v Leatham (1837) 2 Moore PC 72 (refd)
Mullins v Howell (1879) 11 Ch D 763 (refd)
Ottos Kopje Diamond Mines Ltd, Re (1893) 1 Ch D 618 (refd)
Pickard v Sears & Barrett (1837) 6 AD & E 469 (refd)
RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd (No 1) [2002] 1 AMR 710 (refd)
Robertson, Ex p; Re Morton (1875) LR 20 Eq 733 (refd)
Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor [1993] 4 CLJ 177 (refd)
Smith v Baker (1873) LR 8 CP 350 (refd)
Stannard v Harrison (1871) 19 WR 811; (1871) 24 LT 570 (refd)
Sugden's Trusts Sugden, Re v Walker [1917]1 Ch D 511 (refd)
Teoh Tian Lai v PP [2001] 1 MLJ 275 (refd)
Wilding v Sanderson [1897] 2 Ch D 534 (refd)
Worthington & Co, Ltd v Abbott [1910] 1 Ch D 588 (refd)

Legislation referred to

Rules of the High Court 1980 O 29 r 1(2BA), O 56 r 2
Courts of Judicature Act 1964 ss 3, 68

Rakhbir Singh (*Nordina Mohd Yusof*, *Prakash Singh* and *Gurmeet Singh* with him) (*Rakhbir Singh & Co*) for the plaintiff.

DP Naban (*Gan Khong Aik*, *Chong Lee Yee* and *Joyce Teh* with him) (*Lee Hishammuddin*) for the defendant.

Abdul Malik Ishak J: I will not go into the merits of the case. I need to allude to the salient facts relevant to this judgment and nothing more.

On 21 May 2001, I granted an ex parte interim injunction against the defendant on the application by the plaintiff. I made an ancillary order that the plaintiff should give an undertaking as to damages bearing in mind that the purpose of the undertaking was to vest the court with the jurisdiction to make the appropriate orders so as to recompense the loss which the defendant may suffer in the event it is established that the plaintiff was not entitled to the ex parte interim injunction in the first place. The undertaking

would certainly place the defendant in a better position to seek recompensation in the event it will be shown that the defendant was wrongly cited or enjoined as a party (*Attorney General v Albany Hotel Company* (1896) 2 Ch D 696 at p 699). Bearing in mind that I had to 'fix a date for inter partes hearing to be held before the expiry of the 21 days' (see O 29 r 1(2BA) of the Rules of the High Court 1980 ('the RHC')), I then proceeded to fix the date of the inter partes hearing on 8 June 2001.

On 8 June 2001, the defendant needed time to file an affidavit in reply and the plaintiff had no objection. The parties magnanimously agreed that the hearing of the inter partes be fixed on 18 June 2001. The parties too were very amicable and they both agreed to a holding over of the order of this court dated 21 May 2001. Since both the parties had agreed to the holding over, this court made a ruling to that effect. The date for the inter partes hearing was then fixed on 18 June 2001.

On 18 June 2001, the defendant's counsel expressed a desire to reply to an affidavit and the plaintiff's counsel agreed and said that it was in the interest of justice that the defendant be allowed to reply. Both parties then sought for an adjournment to the next day — meaning to 19 June 2001 at 2.30pm. This court willingly obliged and made a ruling for a holding over since both the parties agreed that the injunction would continue to the afternoon of 19 June 2001 or after the submissions thereto. Thus far, counsel for both sides acted gallantly and the atmosphere was indeed pleasant. There was an air of friendliness all round.

On 19 June 2001, the learned counsel for the defendant informed this court that he had filed an affidavit yesterday — meaning on 18 June 2001 at 6.20pm. How an affidavit could be filed in the court registry at 6.20 pm was beyond me. Be that as it may, it transpired that just a short while ago the plaintiff had served an affidavit in reply onto the defendant's counsel and now sought for time to respond to that affidavit in reply. The learned counsel for the defendant said that he had contacted his client — referring to the defendant, who had directed him to respond. The learned counsel for the plaintiff had no objection and he cited 'justice' as his sole reason for the stand which he took. Both parties then requested for a date towards the end of the month. This court then fixed the hearing of the inter partes to 28 June 2001, and this court too made a ruling to extend the holding over as agreed by both parties to that date.

On 28 June 2001, counsel for both parties proposed to take a date on 3 July 2001 for the hearing of encl 4 which was basically for the inter partes hearing of the ex parte interim injunction, as well as for the hearing of encl 16 which was the defendant's application for the following orders:

(1) that the plaintiff's order for an ex parte injunction dated 21 May 2001 be set aside;

(2) that the costs of this application be borne by the plaintiff; and

(3) all other and further reliefs which this honourable court deems fit and proper.

Of utmost importance was this. That both parties agreed to a holding over till 3 July 2001. This court then made the rulings as sought for, namely, that the hearing of encll 4 and 16 be fixed on 3 July 2001 and the holding over as agreed by both parties be extended till 3 July 2001.

On 3 July 2001, the learned counsel for the plaintiff was unwell and he sought an adjournment to 11 July 2001. The learned counsel for the defendant submitted that he was always prepared to submit and he informed the court that late yesterday evening he was served with an affidavit but nevertheless he was ready to submit. However, he submitted that since the learned counsel for the plaintiff was unwell, he would not object to an adjournment. But all the same, he submitted that this time he could not agree to a holding over of the injunction because the terms of the injunction had caused tremendous hardship to the defendant to comply. For this very reason, the learned counsel for the defendant submitted that the defendant was in a dilemma and he hoped that the issue of the injunction would be settled soonest. Now, this was the first time that the learned counsel for the defendant registered his protest to the holding over of the injunctive order dated 21 May 2001. In response, the learned counsel for the plaintiff submitted that when the defendant sought an adjournment, a holding over was granted. He submitted that he tried to be magnanimous by coming up and down — it must be borne in mind that the learned counsel for the plaintiff hails from Labuan, Sabah, and that he had incurred costs on all occasions and never asked for anything. He submitted that if ever there was an affidavit to be filed it was because of concealment of facts which he had alluded to in his affidavit. I then fixed the date for the hearing of the inter partes and the setting aside of the ex parte injunction to 11 July 2001. I then made a ruling that the holding over was to be extended notwithstanding the objection of the learned counsel for the defendant.

On 11 July 2001, the learned counsel for the plaintiff submitted that there were numerous affidavits filed by both parties in relation to encll 4 and 16 and there was a need, according to him, for me to peruse through the evidence with a toothcomb and he cited the case of *Segar Restu (M) Sdn Bhd v Wong Kai Chuan & Anor* [1993] 4 CLJ 177, as an authority. That was a case decided by me, and at p 182 thereto, I had this to say:

> I am mindful of the salutary advice by Gill CJ Malaya (as he then was) in *Tay Seng Keng v Tay Ek Seng Co Sdn Bhd* [1978] 1 MLJ 126 FC, that it was quite impossible to say on a mere consideration of evidence given on affidavits that the guilt of the appellant had been proved beyond reasonable doubt and, consequently, the appellant's imprisonment, in that case, for contempt of court could not be sustained. But the facts in the present application are entirely different in that they are clear as crystal and, for fear of being repetitive, the affidavits of both parties clearly point to the breaches of the court Order by the first defendant beyond all reasonable doubt. The affidavit of the first defendant shows that he had acted under the guise and pretence of ignorance when he entered Lot 76. In fact, the first defendant apologised to this court in his short affidavit affirmed on 16 July 1993 and this would clearly differentiate *Tay Seng Keng's case* with the present application. I had occasion to say in *Lye Fong Weng & Anor v Deputy Minister of Home Affairs & Anor.*

(Criminal Applications No 44–6–93 & 44–7–93) that: 'After all, it had been said that sometimes the truth seeps out of an affidavit.' This would certainly be the case here. The truth simply oozed out from the affidavits of both parties.

The learned counsel for the plaintiff, then craved this court's indulgence to adjourn the matter and to proceed on 16 July 2001. He too prayed that the injunctive order be held over until 16 July 2001 or until the completion of encll 4 and 16. Surprisingly the learned counsel for the defendant agreed to these proposals. I then adjourned the proceedings to 16 July 2001 and made a ruling that the holding over be extended, as agreed between the parties, until the completion of the inter partes hearing.

On 16 July 2001, the matter once again came up before me. The learned counsel for the plaintiff submitted that this was a part heard inter partes injunction. After alluding to the various affidavits, both parties proposed to file written submissions, and I then gave directions in regard to the written submissions. I too made a ruling that the ex parte injunction be continued until my decisions pertaining to encll 4 and 16 were announced on 13 December 2001.

On 13 December 2001, the decisions were not announced because counsel for both sides have yet to file their written submissions. It was pointed out that the learned counsel for the plaintiff had just filed his written submission. The learned counsel for the plaintiff sought to explain the delay by alluding to a letter which he sent to this court on 12 December 2001 where he explained that he had to proceed to the United Kingdom to accompany his daughter for a 'brain damage' supervision. Meanwhile, it was submitted on behalf of the plaintiff that this court should extend the injunctive order further. Once again, the learned counsel for the defendant objected and he submitted that the injunction ought to be set aside. Reliance was placed on the decision of the Court of Appeal in *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433. Nevertheless, I gave further directions for the parties to file their written submissions and for their respective replies. I then fixed 27 June 2002 for my decisions pertaining to encll 4 and 16. In the meantime, I made a ruling that the ex parte injunction was to remain until 27 June 2002.

Analysis

I have since written a judgment where I have expressed my views in regard to the 'workability' of *Cheah Cheng Lan*. That judgment of mine was delivered on 2 January 2002 and it was in regard to the Kuala Lumpur Civil Suit No S5–22–1254–2001 between *RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd (No 1)* where I said that I was bound to follow the decision of *Cheah Cheng Lan*, notwithstanding its infirmities, solely on the basis of the doctrine of stare decisis. I was told by the librarian that *RIH Services (M) Sdn Bhd v Tanjung Tuan Sdn Bhd (No 1)* has since been reported in two popular local law journals, namely the All Malaysia Reports and the Current Law Journal, and the citations would be [2002] 1 AMR 710 and [2002] 1 CLJ 457 respectively.

In this judgment, I must, once again, emphasize that I was bound to follow *Cheah Cheng Lan*. That being the case, I have no choice but to dissolve the ex parte injunction that was granted by me on 21 May 2001. It must be recalled that on every court session after 21 May 2001, both parties agreed to extend the ex parte interim injunction. Even after encl 16 was filed, the attitude of the parties remained unchanged. On 3 July 2001, the learned counsel for the defendant, for the first time, had a change of mind and he objected to the extension of the ex parte interim injunction. But on 11 July 2001, the learned counsel for the defendant agreed, in a surprise move, to the extension of the ex parte interim injunction. Why was there a change of heart? On 13 December 2001, the learned counsel for the defendant once again objected to the extension of the ex parte injunction. As can be seen, there were two objections advanced by the learned counsel for the defendant to the extensions of the ex parte interim injunction. The first was on 3 July 2001 and the second was on 13 December 2001.

Can the doctrine of estoppel be used as a sword against the defendant who, through their learned counsel, had agreed to the extension of the ex parte interim injunction on those occasions as alluded to above? Lord Wright while delivering the judgment of the Privy Council in *Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 at p 55, succinctly said:

> There was, perhaps, a time when estoppels were described as odious and as such were viewed with suspicion and reluctance. Mr Devlin has sought to apply the same test to a case where it is sought to qualify words which is unqualified would constitute an estoppel. But in more modern times the law of estoppel has developed and has become recognized as a beneficial branch of law. That great lawyer Sir Frederick Pollock has described the doctrine of estoppel as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence'.

Once a representation has been made and acted upon, the court will be reluctant to permit the person making that representation to go back on his word or even to allege a situation different from that which he had represented. In *Freeman & Anor, Assignees of William Broadbent v Cooke* (1848) 2 Ex 654, Parke B, after citing the case of *Pickard v Sears & Barrett* (1837) 6 AD & E 469, at p 474, said that a man is estopped from denying what he has represented not only when he represents as true that which he knows to be untrue but whatever his 'real intention may be he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it and did act upon it as true'. Indeed, this court had acted on the representation by the learned counsel for the defendant when the ex parte interim injunction was extended from time to time. Surely this court was entitled to act upon the representation of the learned counsel for the defendant 'as true'.

Apart from the doctrine of estoppel, there is another principle of law that requires mention. It is this. That the holding over was made with the consent of the parties. It is a correct statement of the law to say that prima facie once an order is made in the presence and with the consent of counsel

it becomes binding on all parties to the proceedings as well as and inclusive of those claiming under them (*Stannard v Harrison* (1871) 19 WR 811, (1871) 24 LT 570; *Harrison v Rumsey* (1752) 2 Ves Sin 488; *Moss v Leatham* (1837) 2 Moore PC 72 and *Worthington & Co Ltd v Abbott* (1910) 1 Ch D 588); and that order can never be varied or discharged unless the order was obtained by fraud, or collusion, or by an agreement contrary to the policy of the court (*Buck v Fawcett* (1733) 3 PWMS 242; *Cole v Langford* (1898) 2 QB 36; and *Bowker v Hunter* (1783) 2 Dickens 605 at p 611). Here, as can be seen from the narration of the facts, when the parties agreed by consent to the holding over of the ex parte interim injunction on every occasion, there was no fraud nor collusion nor were the parties acting contrary to the policy of the court. Of pertinence would be the fact that the parties agreed by consent to the holding over through counsel of their own choice. This was certainly not the case where the consent was given without sufficient materials or in complete misapprehension or in total ignorance of material facts (*Wilding v Sanderson* (1897) 2 Ch D 534 (CA); *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* (1895) 2 Ch D 273 (CA); *Holt v Jesse* (1876) 3 Ch D 177, at p 183; *Davenport v Stafford* (1845) 8 Beav 503, at p 508; *Furnival v Bogle & Ors* (1827) 4 Russ 141, at p 142; *Ex p Banner, Re Blythe* (1881) 17 Ch D 480 (CA); *Carew v Cooper* (1863–64) 12 WR 767; and *Attorney-General v Tomline* (1877–78) 7 Ch D 388). This was also not the case where the consent was obtained by mistake on the part of one party (*Mullins v Howell* (1879) 11 Ch D 763); nor was this a case where the mistake was induced by the other party, namely, the plaintiff (*Wilding v Sanderson*). Pure and simple, there was no mistake at all on the part of the learned counsel for the defendant when he consented to the holding over.

I am told that the defendant has filed an appeal against my ruling that was made on 13 December 2001 when I ruled that the ex parte injunction was to remain until 27 June 2002. A ruling can never be equated to a judgment, sentence or order. By way of a comparison, reference should be made to the case of *Teoh Tian Lai v PP* [2001] 1 MLJ 275, a decision of the Court of Appeal, where the court held, inter alia, that the decision of the High Court in ordering the applicants to enter their defence was a ruling that did not have the effect of finally disposing of their rights. At any rate, my ruling on 13 December 2001 was not caught by the definition of the word 'decision' as set out in s 3 of the Courts of Judicature Act 1964 ('the CJA'). That section is an interpretation section and it interprets the word 'decision' in this way:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

Incidentally, O 56 r 2 of the RHC states as follows:

> Subject to the provisions of s 68 of the Act, a party may appeal against any judgment, order or decision made by a judge in chambers.

and it is quite apparent that a 'ruling' is outside the scope and ambit of the said order. Section 68 of the CJA is of equal importance. That section enacts as follows:

(1) No appeal shall be brought to the Court of Appeal in any of the following cases:

(a) when the amount or value of the subject matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit, except with the leave of the Court of Appeal;

(b) where the judgment or order is made by consent of parties;

(c) where the judgment or order relates to costs only, which by law are left to the discretion of the court, except with the leave of the Court of Appeal; and

(d) where, by any written law for the time being in force, the judgment or order of the High Court is expressly declared to be final.

(2) *(Repealed by Act A886).*

(3) No appeal shall lie from a decision of a Judge in Chambers in a summary way on an interpleader summons, where the facts are not in dispute, except by leave of the Court of Appeal, but an appeal shall lie from a judgment given in court on the trial of an interpleader issue.

Now, as presently worded, s 68 of the CJA is entirely silent in regard to a 'ruling' made by a judge in chambers. But since a 'ruling' is not a 'decision' within the meaning of s 3 of the CJA, the defendant could not even appeal against my ruling that was handed down on 13 December 2001. These exercises are certainly food for thought for the initiated. Be that as it may, in the final analysis, the decision of the Court of Appeal in *Cheah Cheng Lan* posed a barrier to the plaintiff. Shackled by *Cheah Cheng Lan*, the days of the plaintiff are numbered. In reality, the life span of the ex parte interim injunction that was granted on 21 May 2001 had automatically lapsed at the end of 21 days from the date on which it was granted. Calculation wise, the ex parte interim injunction should 'automatically lapse' on 10 June 2001. Here, the ex parte interim injunction was allowed to remain even after the end of the 21 days because, firstly, the parties agreed to a holding over on those days as alluded to above and, secondly, there was consent all round to a holding over on those days as alluded to above. Consequently, the doctrine of estoppel would come into play in favour of the plaintiff. But, unfortunately, with the advent of *Cheah Cheng Lan* all these legal niceties would die a natural death. What a pity.

The law books are replete with authorities on estoppel. But in construing the life span of an ex parte interim injunction as alluded to in *Cheah Cheng Lan*, the doctrine of estoppel wherein the defendant through its learned counsel agreed to the holding over seemed to be of no consequence at all. Of course, estoppel has often been described as a rule of evidence (*Low v Bouverie* (1891) 3 Ch D 82 at p 102 (CA); *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247 at pp 252–253, [1956] 1 WLR 29 at pp 39–40 (CA); *Re Ottos Kopje Diamond Mines Ltd* (1893) 1 Ch D 618 at p 628 (CA); *Harriman v Harriman* (1909–10) P 123 at p 144 (CA); *Jocelyn Brandon v Dowager Baroness Michelham* (1918–19) 35 TLR 617; *Re Sugden's Trusts Sugden v Walker* (1917) 1 Ch D 511; and *Combe v Combe* [1951] 2 KB 215, [1951] 1 All ER 767 (CA)), but I prefer to accept it as a substantive rule of law (*Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* particularly at p 56 (PC); and

Moorgate Mercantile Co Ltd v Twitchings [1975] 3 All ER 314 at p 323, [1975] 3 WLR 286 at p 296). In law, there are four kinds of estoppel, namely:

(1) estoppel of record or quasi of record;

(2) estoppel by deed;

(3) estoppel *in pais;* and

(4) promissory estoppel.

In this exercise, I am only concerned with estoppel *in pais* which arises from the conduct of the learned counsel for the defendant who blew 'hot and cold' in regard to the holding over. It is often said that a person should not approbate and reprobate (*Lissenden v CAV Bosch Ltd* [1940] AC 412 at pp 417–418, [1940] 1 All ER 425 at p 429). It simply means that when a person has a choice between two courses of conduct and he picks and elects one choice of conduct, he cannot later resile from it. Here, the learned counsel for the defendant agreed to the holding over in order to file an affidavit in reply and he has benefited from that course of conduct and subsequently he cannot resile from it. By resiling, his subsequent conduct was in fact inconsistent with his earlier conduct. In short, he cannot approbate and reprobate (*Banque Des Marchands De Moscou (Koupetschesky) (In liquidation) v Kindersley & Anor* [1951] 1 Ch 112 at pp 119–120, [1950] 2 All ER 549 at p 552, where his Lordship Sir Raymond Evershed MR cited with approval the following cases:

(a) *Smith v Baker* (1873) LR 8 CP 350;

(b) *Ex p Robertson, Re Morton* (1875) LR 20 Eq 733;

(c) *Evans v Bartlam* [1937] AC 473 at p 479, [1937] 2 All ER 646 at p 649 (HL)).

But alas, in the context of *Cheah Cheng Lan*, all these legal niceties would come to nought.

Conclusion

For the reasons adumbrated above, I now make a ruling that the ex parte interim injunction that was handed down on 21 May 2001 be dissolved forthwith. I too make a ruling that the undertaking as to damages by the plaintiff be assessed by the learned senior assistant registrar.

Order accordingly.

Reported by Lim Lee Na